STUDY PAPER

on

PROSPECTS FOR CIVIL JUSTICE

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY

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The Ontario Law Reform Commission was established by the Ontario Government in 1964 as an independent legal research institute. It was the first Law Reform Commission to be created in the Commonwealth. It recommends reform in statute law, common law, jurisprudence, judicial and quasi-judicial procedures, and in issues dealing with the administration of justice in Ontario.

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EXECUTIVE SUMMARY

of

STUDY PAPER ON PROSPECTS FOR CIVIL JUSTICE

by

Roderick A. Macdonald

with commentaries

by

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PREFACE

This document contains an Executive Summary of a Study Paper on Prospects for Civil Justice by Professor Roderick A. Macdonald of the Faculty of Law, McGill University, and related commentaries by a distinguished group of experts. The full text of the Study and related commentaries is being published by the Ontario Law Reform Commission as a contribution to the work of the Ontario Civil Justice Review.

The Ontario Civil Justice Review is a joint initiative of the Government of Ontario and the Ontario Court of Justice (General Division). The Terms of Reference for the Review mandate the Review to develop an overall strategy for making the Civil Justice System speedier, less complex and less costly for litigants, and for maximizing the effectiveness of public spending on civil justice. The Review is conducting this mandate through two separate working groups, an Interim Task Group, and a Fundamental Issues Group.

The Interim Task Group has been asked to look at improvements to the system of civil justice from the inside—essentially issues of administration and procedure within the judicial system. It will identify immediate points of pressure on the courts and offer proposals to relieve this pressure.

The Fundamental Issues Group, by contrast, is to reflect upon the optimal structure for organizing the system of civil disputing in Ontario. Which disputes ought to be decided by adjudicative processes before courts? Which disputes could or ought to be decided by other public bodies such as administrative agencies, or by other decisional processes such as mediation? Which disputes could or ought to be decided by private decisionmakers, whether through adjudication or some other dispute resolution process?

Professor Macdonald was commissioned by the Fundamental Issues Group to prepare a Study Paper that would identify and analyze the critical policy issues entailed in a fundamental reconsideration of civil disputing in Ontario. The Study Paper is published by the Commission together with a series of commentaries by a panel of Canadian, American and English experts. Members of the panel were invited to review and reflect upon the Macdonald Study Paper and offer the Fundamental Issues Group some advice with respect to the lines of inquiry and types of research the Group could most usefully pursue. Publication of the Study Paper and Commentaries is intended to facilitate and stimulate public discussion of these important issues.

March, 1995

SUMMARY OF STUDY PAPER

Roderick A. Macdonald, "Prospects for Civil Justice"

Macdonald's paper is divided into two main parts: recognizing, creating and formulating civil disputes (Part 1), and allocating civil disputes so as to enhance access to justice (Part 2).

The author asks, what, exactly, is the problem or set of problems that the Civil Justice Review is meant to address. Maybe the public is genuinely distressed by the cost of civil litigation. But by far the largest component of the expense of law suits is legal fees. Hence it is difficult to see how increasing efficiencies in the court system will have much impact in reducing costs to litigants. On the other hand, if the cost to the taxpayer in maintaining the present civil justice system is an overriding concern, then strategies for reducing litigation, or streamlining the judicial process, might well be worth pursuing. If court overcrowding is the concern, two main approaches to a solution are possible: one can either increase supply, or one can reduce demand. Increasing supply will surely increase the cost of the civil justice system to the taxpayer and may only provide temporary relief if demand quickly increases to match supply. Decreasing demand might require a decision to keep the cost of litigation relatively high or to keep delays relatively long in order to give potential litigants incentives to take their disputes elsewhere.

Another foundational question is: what evaluative perspective is or should be adopted. One such perspective, typically that of the internal participant in the litigation process, understands the key issues to be those of distribution of disputes or administration of the system. Another perspective, typically that of users and non-users of the system, understands the key issues to be those of allocation and recognition.

A final foundational issue concerns the assumptions underlying the Civil Justice Review. What are the data on which its various claims about the current performance of the civil justice system are to be based? Statistical evidence about the rate and character of civil litigation is largely lacking.

Three of the key problems likely to bedevil attempts to improve Ontario's civil justice system are, therefore: (a) a relative uncertainty about what the central questions are; (b) a lack of consensus about which perspectives should be adopted in assessing how efficient and accessible the system is; and (c) general absence of detailed information either about citizen perceptions or about actual rates of civil disputing both in courts and elsewhere.

Part I of the study looks at the different ways by which the legislature and the courts give concrete form to civil disputes once a decision to recognize them has been taken. Part II of the study then examines the range of factors that might go into decisions about how, where and when to process certain types of civil disputes, once the legislature has decided to give them legal expression.

Trying to determine an optimal configuration of judicial and non-judicial dispute resolution mechanisms, of publicly funded and privately funded institutions, and of adjudicative and non-adjudicative processes, and trying to determine the optimal configuration of incentives so as to induce citizens to select one or the other of these alternatives is the major law reform issue confronting the Civil Justice Review.

Part I: Institutional Design — Recognizing, Creating and Formulating Civil Dispute

In this Part, the author deals with the transformative effects of legal recognition of certain interests and how such recognition turns personal and social conflicts into potential civil disputes.

With only a few exceptions, the basic pattern of the common law was transactional and its underlying logic was that of corrective justice. But statutory law reform usually involves the legislature acting to shift the values of the law and to change the relative balance of power or advantage from one class or group of persons to another. In so doing, such reforms incorporate some principle of distributive justice into the basic framework of the common law. This is also true of many legislative reforms that create administrative agencies. However, social policies which can only be described by more abstract formulae such as equity, fair, just and reasonable do not easily lend themselves to adversarial adjudication. Finding the optimal balance of legalism and judicial discretion in adjudication and avoiding servility to one or the other (being legalistic or being arbitrary and capricious) is what defines civil justice.

The author questions whether proposals for greater legislative precision and better specification of statutory definitions i.e. making rules more precise can reduce the amount of uncertainty and hence potential for litigation. Almost no legal rules are self-applying and self-evident characterizations of human behaviour. Thus, legal rules can never prevent litigation even when they seem to be relatively precise and straightforward. The author argues that the precision or imprecision of legislative rules is a trivial component of the equation relating to rates of litigation. Whether or not to recognize civil disputes by statute and whether or not the statute is written so as to create new rights and distributive

effects are by far the more important factors. By parity of reasoning, it is difficult to see how statutory restatement or codification of the common law is likely to have a significant impact on rates of litigation.

The author raises the possibility of obliging the legislature to undertake pre-enactment audits so as to determine the projected effect of a new statute on the civil justice system. He also suggests that the legislature undertake five and ten year post-enactment audits to monitor the actual impact of its various initiatives on the nature and rate of civil disputing.

Once the legislature or a court has decided to recognize an interpersonal or social conflict as a civil dispute, it must then decide how to give that recognition concrete legal expression. For example, the legislature must select the institution to which it allocates authority to handle the dispute e.g. a public servant, a specialized administrative agency, a minor judicial official, a judge, an arbitrator or even the Cabinet. It must also choose the decision-making process and then decide exactly how it shall formulate the legal entitlements of the question as well as choose the type of remedy available to the decision-maker. These decisions about institutional design will have as great an impact on the rate and nature of civil litigation as the initial decision to give legal recognition to a claim.

The present system of civil justice in Ontario assigns pride of place to the courts. The existence of the Civil Justice Review suggests, however, that we have too long been operating with unrealistic assumptions about the kinds of individual conflicts and social problems that can be solved efficiently in this manner. What exactly is it that we find admirable and worth preserving in the court system? What does judicial adjudication actually consist of? What, if anything, are its essential elements and what are peripheral, contingent, and culturally relative? Do we really have any sense of what types of problems traditional adjudication is well suited to handling and what types it is not.

The author concludes that it is virtually impossible to decide the essential features of adjudication either by reference to the character of the decision-making office or the character of the process. Not all civil adjudication takes place in courts, and courts are often asked to undertake decision-making processes other than adjudication. There is nothing about the process of adjudication that requires all civil disputes to be decided by courts. There are few features of the current judicial system that are also not present in an administrative tribunal. However, in the common law tradition, judicial decision-making has a recognized law-making function: courts not only decide disputes between private parties but set new precedents which then become law for all citizens. The bivalent nature of civil dispute resolution is said then to require that civil disputes should always be processed by adjudicative bodies whose decisions are public, publicized and accessible. However, if we countenance private

settlement by parties to official litigation, then we should not in principle be concerned about private settlement of disputes by third parties. The author notes that the less specialized and the more democratized the litigation bar, the greater the chance of litigation to contest perceived understandings of the law.

While the author argues that a close examination of legal practice and its bearing on civil justice may be beyond the scope of the Civil Justice Review, a number of important questions arise such as the how the existence of a professional monopoly bears on the development of alternative forms of processes for resolving disputes. The possibility of pluralizing the legal profession leads to consideration of whether a greater use of paralegals and legal technicians will improve the civil justice system in Ontario.

The author suggests that a recasting of civil disputes so as to change the nature and rate of civil litigation probably requires a certain recasting of the legal profession and concomitantly a recasting of legal education. Courts are no longer seen as adjudicators of private disputes. For better or worse, recent legislation has converted them into mini-political arbiters. If the civil litigation process has in part become a surrogate political process, the root question about matching process, problem and institution of civil disputing is how we can enhance democratic decision-making within other social institutions.

If the Civil Justice Review is to make a lasting contribution to improving the civil justice system in Ontario, it must ask not one but a series of questions about matching individual social problems to particular institutional processes: (i) what form of law-making should be adopted in the instant case? (ii) what process of dispute settlement (adjudication, voting or mediation, for example) should be adopted? (iii) need the dispute be argued before a public body or a private body, and in the former case, before a court or other tribunal (iv) what types of tasks (retributive, redistributive, allocative) does one want to assign to the third-party decision-maker in question? (v) does one want the decisions of the institution in question to serve formally as precedents for future decisions? (vi) what type of remedy does the legislature want the institution to be able to offer? and (vii) what types of professional training will have to be given to the legal profession or the legal professions in order to enable it to make most efficient use of the various alternatives for handling civil disputes. Only after these questions are addressed is it really possible to begin to allocate different types of civil disputes to different kinds of bodies, or to provide that they should be heard and decided following dispute-resolution procedures other than classical adjudication.

Part II: Allocating Civil Disputes so as to Enhance Access to Justice

The idea of access to justice can be understood in two quite different ways: first, as a matter of providing more accessible civil justice, where that system is conceived of comprising the formal judicial process. Secondly, the idea could be understood as matter of providing a more accessible civil justice system where that system is conceived of as the panoply of public and private institutions and processes by which interpersonal and social conflicts are recognized, negotiated, and resolved. Most modern studies of access to justice adopt the second conception.

To ask whether Ontario has a system of official dispute resolution which is cheap, efficient, expeditious, and equally accessible to all citizens is another way of asking what barriers to access to justice there are. These barriers are grouped into objective barriers and subjective barriers. Objective barriers are those relating to factors such as cost, delay, complexity of the system, unintelligibility of legal texts, geographic isolation of certain communities, physical accessibility of courthouses, lack of adequate translation services etc. Subjective barriers are those that are intimately connected with socio-cultural background, to the perceptions of citizens, and to their knowledge of their rights.

There is a growing sociological literature in the United States on the relationship between socio-demographic characteristics of litigants and legal outcomes. This literature appears to reveal that many of our assumptions about neutrality and objectivity in the litigation process are suspect. For example, it seems that repeat players are disproportionately successful. Again it appears that the demographic and ethnographic characteristics of litigants, their relative social status, and their relative degree of organization are all crucial determinants of their success in judicial proceedings.

With respect to objective barriers, the author is sceptical that the provision of judicare (free legal services along a medicare model) and trial on demand overcome the most important barriers to access to justice. He also doubts whether existing procedures of the judicial system are a significant cause of lack of access to justice. Will better court administration, case management, teleconferencing, and so on make the adjudicative process more efficient and responsive? Should the limited public resources devoted to civil justice be directed to enhancing the use of courts and other public institutions for resolving disputes? In other words should the goal be to design a system that efficiently turns all human conflict into a legal dispute, or might resources be better deployed in nurturing more local, less formal, community managed civil justice institutions?

No doubt providing better financing for legal services would address the public's concern with cost. Yet expanding the range of models for financing the cost of legal services will increase the amount of civil litigation undertaken. Unless the number of courtrooms and judges is augmented, one can predict that the judicial process will then be less, not more expeditious. By contrast, changing the relative cost to litigants of a lawsuit may enhance efficiency by reducing the demand for judicial dispute resolution and may also reduce the overall cost of maintaining a civil justice system, but it achieves these goals at the cost of access to the judicial process. As long recourse to the courts is seen as the preferred mechanism for resolving civil disputes there are likely to be few improvements to the civil justice system that do not involve trading off cost as against expediency, or trading off cost to individual litigants as against cost to the public.

Many citizens do not, however, see greater access to the courts as a necessary component of access to justice. Public opinion surveys indicate that until they are actually confronted with a problem that they are unable to solve in some other way, citizens are ambivalent even about going to see a lawyer. Lawyers, courts and litigation are usually seen as a last resort. This suggests that the strategy of enhancing access to justice by increasing the supply of dispute settlement resources need not be pursued only by building more courtrooms and appointing more judges. While some disputes could be assigned to administrative agencies with the power to hear and decide individual cases, it is not clear that these tribunals and agencies are any better than courts either at solving objective access to justice problems or to overcoming subjective barriers to access to justice. Backlogs in certain tribunals are as great as in the regular judicial system.

A complementary strategy would be to establish mandatory non-judicial dispute processing systems either as pre-condition to invoking, or as an alternative to, the ordinary civil disputing process in the courts. There is today a great diversity in alternative processes for resolving interpersonal and social conflict in private initiatives. But each is largely outside the supervision of the ordinary courts; each tends to be less systematic and does not generate public precedents; and each depends on the willingness of private parties to cooperate and has no built-in means of coercing participation or compliance.

Is the ambition of the Civil Justice Review to fix-up a process of civil litigation that some commentators seem to feel has bogged down the courts, by allocating to other dispute resolution institutions those disputes that cannot be handled effectively by courts? Or is it to enhance access to civil justice by providing novel institutions and mechanisms by which ordinary citizens may formulate, argue about and resolve their interpersonal and social conflicts in a manner that is both efficient and respects their own views of the problem to be resolved and the remedial outcomes to be achieved? Taking the second approach, the author goes on to explore various mechanisms or criteria for allocating

disputes to different institutional channels. Streaming not only requires an inventory of the different institutional and process possibilities, but it also requires an inventory of the different kinds of interpersonal and social conflicts. Civil disputes may be classified in relation to their sources, their object, their parties, and their nature. With respect to classification by source, the notion of source can have a geographic connotation or can be based on the legal characterization of the issue to be decided (ie. subject matter). With respect to classification by object of the dispute, the most common criteria employed here relates to the amount of the dispute. However, a number of disputes do not have a monetary equivalent and even where they do it is not clear that dollar figures provide any reliable index of the significance of the dispute. Classification of disputes could take place on the basis of the parties to the dispute, e.g. individuals, corporations, governments. The author expresses scepticism as to whether there are any easily applied criteria for type-casting certain disputes and allocating them to courts or other institutions for resolution.

Without an inventory of the kinds of decision-making powers of institutions that currently form the backbone of the civil justice system in Ontario, it is impossible to make informed decisions about the possible effects of any reallocation of disputes. These is simply not enough reliable data to make more than educated guesses about the landscape of civil disputes. The author suggests that at least four constituencies should be invited for their subjective perceptions on the current operation of the civil justice system: the judiciary, the Bar and court users, although the opinions of the administrative decision-makers, public servants and the general non-litigating public are as important. The author identifies various subconstituencies that might be surveyed and asked for their opinions on what types of civil disputes should go to court and what disputes should be kept out.

Another approach to streaming different kinds of conflicts to non-judicial settlement institutions is to adopt an allocation methodology which seeks to determine the relative importance of different kinds of disputes. The author suggests a speculative point system for assessing the relative importance of dispute. Another approach would be to allocate civil disputes among different dispute settlement bodies on the basis of consent either prior to or subsequent to a dispute occurring.

If the legislature develops a system of public alternatives for the judicial system, it will also have to develop a series of policies by which it decides (a) what disputes must be brought to each of these new institutions; (b) what disputes may not be brought before them; and (c) the range of incentives that will be put in place to encourage disputants to select one of the other alternatives. One option is to require certain classes of disputants to pay the full cost of the trial before the Ontario Court (General Division). This would constitute a powerful incentive to seek out some other dispute settlement

institution. An important issue that would arise is whether there are certain kinds of life situations currently regulated by the civil law where persons should not be permitted to contract-out of the ordinary judicial dispute resolution process.

Another issue is whether there are certain contractual arrangements where no *a priori* consensual arbitrations should be permitted even if *ex post facto* private dispute settlement is permitted e.g. contracts of adhesion, or contracts affected by inequality of bargaining power. A corollary issue is whether contractual arbitration should only be permitted if the dispute settlement process in question meets certain minimum standards of transparency, independence, and procedural due process. Also, are there other certain kinds of disputes where contractual arbitration should be permitted only if it also gives rise to a full appeal on the merits to the court? Until the late 19th century, courts were in open competition for litigation business. Consideration of alternative dispute resolution is the late 20th century version of the ideal that parties should have a measure of choice in deciding where to have their disputes decided. Only in rare circumstances should the legislature actually insist that a civil dispute be processed in a particular institution. Only in limited cases should arbitration and like contractual clauses be subject to judicial review. In all other cases, the legislature should not be reluctant to employ various procedural and incentives to influence the streaming choices of individual litigants.

However, two main issues relating to the integrity of the non-judicial dispute settlement process arise: (a) by what means are the non-judicial decision-makers themselves to be certified, if at all? (b) what mechanisms should be put in place to supervise the decisions of non-judicial decision-makers? One could imagine the legislature creating a regime for *ex ante* certification of non-judicial dispute settlement institutions i.e. by requiring certification of either decision-makers or processes or both. However, what is the rationale for government regulation of these issues once it has been determined that parties should be freely permitted to opt out of the court system? That is, where non-judicial decision-making is not legislatively imposed, why should the market not determine which purveyors or which services will survive? No democratic society can function without a judiciary ultimately accountable to the general public. But no democratic society can function if all dispute resolution has to be undertaken in the public domain.

The above discussion reveals that the development of strategies for allocating civil disputes between various public dispute resolution bodies, and as between public and private bodies, is an extremely difficult exercise. The reasons bear reiteration. First, we do not know exactly what is currently the state of civil disputing in Ontario. Second, we do not know exactly what is the problem with the system that we are trying to solve. Third, we do not know what perspectives to adopt in seeking solutions. Fourth, we do not know what our measurement criteria for deciding as between various alternatives should be. Fifth, we do not

really know what these alternatives are. Sixth, we do not know how to distinguish between various types of civil dispute. Seventh, we do not know whether any decisions taken will have the desired effect, or whether they will simply change the patterns of civil disputing in perverse ways.

More telling, even were we able to gain a clear appreciation of the "landscape" of disputes and even were we to decide our standards of measurement, and even were we to have a comprehensive inventory of processes, institutions and civil disputes, we would have advanced only a small way down the desired path. We would still have to undertake empirical analysis and measurement. Then, having done so, we would have to make policy judgments about what to do, not only on the basis of these theoretical models, but also on the basis of our predictions about how potential litigants would react to our proposals. In the final analysis, we are not even certain about the goals we seek to promote in dispute resolution as a social process.

Conclusion: Recasting Ontario's Civil Justice System

The Civil Justice Review ought to start by asking what are the different occasions where cost and delay might be a good thing. To the extent that our conception of access to justice is cast in terms of state managed dispute resolution institutions, we are likely to see more law as the solution to law's failures. The Quebec Task Force on Access to Justice found that a much more important failing, at least in the eyes of the general public, was unequal access to the legislative process to make law and to those public offices through which law is applied and enforced.

The idea of preventative law is one way of re-imagining civil disputing. Both preventative and remedial law are ways of thinking about roles and relationships and about negotiating human interaction and interpersonal conflict. Of course, disputes, conflicts, and disagreements will not go away if only we begin to think in terms of preventative law. On the other hand, the optimal condition for obtaining civil justice in Ontario surely is not to load up the structural and financial incentives so that the aggressive articulation of disputes, conflicts and disagreements will be encouraged.

Determining the social space that optimally should be allocated to the complimentary metaphors of preventative and remedial law is the fundamental challenge facing those who would find a better understanding of access to justice and civil dispute resolution in Ontario today.

SUMMARY OF COMMENTARIES

I. Harry W. Arthurs, Professor of Law, Osgoode Hall Law School, York University

The author's first quibble with the Macdonald paper is about the paper's "voice": it is too collective, too impersonal, too polite, and for that matter too legal. If the purpose of the exercise was to tell truth to power, we would urge the Fundamental Issues Group to tell the government that its project cannot be realized. Given the many other urgent problems, surely legislative time and public funds could be better spent. For example, more civil justice might be achieved for a broader spectrum of citizens per dollar spent by increasing adult literacy and public information about law and justice, rather than by appointing more judges or funding more Charter challenges.

Why not make civil justice more efficient, expeditious and accessible for ordinary citizens by telling certain categories of wealthy disputants that they should take their problems elsewhere, that they are subject to a user-pay policy, or that they have last—not first—call on the scarce resources of the court system i.e. put poor people's lawsuits on a fast track and business litigation on a slow track; shunt rich people's disputes in the private dispute resolution systems; or offer as an alternative to privatization high-speed public adjudication available at premium prices that reflect the true cost of providing public facilities.

The reform of civil justice system is compatible with the challenge of spending less and spending smarter. It generates no intelligible statistics and has no reliable productivity benchmarks so that virtually any change can promise productivity improvements. But improving society for most of us implies more of other things which we are told to want less of: government, social engineering, public expenditures. On the other hand, the Civil Justice Review has to be optimistic, pragmatic and activist because that is what the government has mandated it to be. It is also an existential imperative for us: if we cannot make things better, what is the meaning of our lives and work?

A necessary implication of an increasing tendency towards professional-judicial autonomy is that there will need to be more and more dialogue between government on the one side and judges and lawyers on the other. Macdonald's recommendation for more information and better analysis takes on special importance in this context. Without information we would have a dialogue with the wilfully deaf. With it, there is at least a chance that a serious encounter might be organized between internal and external perspectives on civil justice. We presently lack the analytical frameworks, the empirical methodology and the baseline data with which to produce reliable scientific predictions about costs and

benefits. Moreover, legislative activity is not exclusively or primarily a technocratic process of juridical production in need of better quality controls. These two factors make legislative audits intrinsically problematic and manipulable.

With respect to alternative forms of dispute resolution, these alternatives are abnormal only to outside observers, especially those habituated to the modus operandi of the formal legal system. To those who live within the community served by these alternative systems, it is the state civil courts which are alternative and indeed so alternative that to resort to them is to engage in pathological behaviour. If we were indeed to "de-centre" the civil courts, we would never dream of holding them out as a model to be emulated or of assigning to them the task of policing alternative systems.

The author recommends that in order to institutionalize the government's capacity to introduce a broader and more fundamental perspective into the design and management of the civil justice system the Ontario Law Reform Commission or some other agency in the Ministry should be charged with setting up a small research unit to improve our knowledge and understanding of all aspects of disputing, including the civil justice system.

II. William A. Bogart, Professor of Law, Faculty of Law, University of Windsor

The author expresses puzzlement about the central goal of the project. Is it to canvass the entire range of options in dealing with dispute processing, or is it only to focus on courts and ADR as alternatives to each other. If the goal is to answer the former question, the exercise requires taking full account of the richness and opportunities and shortcomings of the administrative state as an alternative to the courts in twentieth century Canada. If it is the second, the inquiry is a much more modest and limited one. In fact, the Macdonald paper devotes very little attention to directly discussing administrative solutions as an option in tackling civil justice problems. In fact there is an historical pattern to how certain civil justice disputes have been assigned in this country: novel claims reflecting changes in society seek recognition in the courts; a spurning by the judges; recognition by the legislature often through the administrative state. The author provides a series of examples of fundamental disputes which have been channelled exclusively or in large part through the administrative state e.g. no-fault auto insurance, pay equity, human rights violations, access to information etc.

In discussing financial barriers to access, the author notes that legal aid funding for civil claims has been curtailed. He also notes concerns about the impact of the traditional Anglo-Canadian cost rule (the loser pays a large fraction

of the winners' costs) on substantive equality and the ability of individuals from groups seeking to raise important issues in public policy to confront adversaries—frequently governments or big corporations—that are far better able to absorb the costs of such litigation. The author notes the Ontario Law Reform Commission's record of addressing problems of financial barriers to litigation in its report on class actions and its report on the law of standing. The author emphasizes that any project that does not address questions of substantive equality in terms of access to the courts or any other device for dispute resolution cannot claim to be a fundamental review.

The author also proposes that any fundamental review constructively engage issues of diversity in the perspectives of the various minority groups on access to justice.

When commenting on proposals by Macdonald for ascertaining the consequences of legislative initiatives for the civil justice system, the author notes that such efforts are expensive, time consuming, not always acted upon, and can be subject to factors that shift very rapidly. The author recommends that the Task Force sponsor a more focussed project that would recommend the best way to address and gauge issues of impact on the civil justice system.

With respect to Macdonald's proposed screening or channelling criteria, and rules governing costs in different adjudicative fora, the author notes a number of apparent inconsistencies or ambiguities.

III. Owen Fiss, Professor of Law, Yale Law School

While Americans have long been fascinated with arbitration, mediation and other processes now grouped under the heading of ADR, the current interest in ADR can be traced to the late 1970s when it emerged as an integral part of the reactionary politics of that era. During the 1980s, ADR grew in its popular appeal and the constituency behind it broadened. ADR easily accorded with the emphasis upon individual consent in classical liberalism, and drew upon the distrust of government that brought Ronald Reagan to power in 1980. ADR became the judicial wing of the privatization movement.

In its early phase, ADR was used to confront judicial power in all its fullness, and purported to be applicable to all manner of cases. However, during the 80s, ADR was presented as a two track strategy: some cases were suitable for adjudication, others for ADR. Then the principal challenge became one of establishing criteria for dividing or allocating the cases traditionally handled by courts between these two tracks. In the ordinary course of events, reform starts with a problem and then looks for a solution. Labour arbitration, seen as a way of avoiding the onerous decisions of a hostile judiciary, evolved in this manner

in the course of the 20th century. With ADR, the process of reform seems to be reversed: we have a new technique and are now searching for a category of cases to which it should be applied. The Ontario Civil Justice Task Force envisages three or four tracks rather than two, but the dilemma it faces remains the same. The Task Force begins with a distinction among a) courts, b) publicly funded dispute resolving mechanisms that are not courts, and c) private dispute resolving mechanisms.

One basis on which to allocate disputes amongst these various streams is to use justiciability as the allocative criteria. However, the legal process school has never developed an adequate standard for deciding which cases are and which are not justiciable. In any event, cases already in the system which one might view as candidates for diversion to other dispute resolving institutions, are presumably justiciable so that this criterion cannot possibly be used as the sorting criteria. The author suspects that the resources of the judiciary are primarily consumed by the important cases and the trivial cases can be and probably are handled by judges expeditiously.

Professor Macdonald also addresses the possibility of using consent or individual choice as an allocative criterion. Fiss, like Macdonald, is concerned about risks of coercion and inequalities of bargaining power, but is also concerned about how any consent-based sorting criterion can take account of the interests of third parties that may be affected by an adjudicative decision. According to the author, "almost obsessed by our individualistic ideology we in the United States tend to ignore or slight the group dimensions of litigation."

What the proponents of ADR want is not simply free choice among fora, but rather incentives, strong incentives, to guide that choice in favour of ADR for only then would there be any meaningful diversion from the courts to the ADR mechanisms. The demand for strong incentives yields rules that are in fact coercive e.g. submission to arbitration as a condition of judicial access. In any event, whether we deal with incentives or coercion, we still need to identify the category of cases to which the incentives or coercion are to be applied and consent or choice cannot be used for that purpose. In failing to supply an allocative criterion, Macdonald leaves the inquiry pretty much as the Task Force posed it. Of course, he may believe that incentives favouring ADR should be created for all cases. But that is only to abandon the pretence of a two-track strategy and return ADR to the form in which it was originally presented—as an expression of an unspecified unhappiness with the courts or government in general.

IV. Marc Galanter, Professor of Law, University of Wisconsin

Professor Galanter points out that in an apparent reversal of the historical perception of lawyers as pillars of the establishment, a 1993 survey found that Americans who were more critical of lawyers and the legal establishment tend to be more establishment, upscale, and male and to come from elites such as manufacturers, insurers, and doctors. While popular discontent with lawyers and law has also intensified, this remains distinct from elite criticism.

Professor Galanter argues that there are more and more entities that are supplied with the capacity to play the high stakes legal game. Most of these are collectivities. Increasingly, various individual interests are vicariously represented in the legal arena even when fewer individuals find themselves able to participate directly in that arena.

While courts and other tribunals produce two products—dispositions in the cases before them, and signals to other actors in constructing, avoiding and resolving other claims—fewer disputes now run the whole course of possible contests. The proportion of cases that settle has been increasing. This means that in a large and increasing number of instances, it is the signalling function of the courts rather than the direct decisional function that is dispositive. However, we have little solid information on how this signalling function influences disputing behaviour.

In contrast with the criminal process, there is no program for systematic cumulative collection, analysis and publication of the most basic data about the civil court system or other aspects of the legal process. A paper attached by the author and others sketches the kind of information on the civil disputing process (civil justice indicators) that ideally needs to be collected in a consistent and comparable form over time. Professor Galanter argues that as the law addresses new demands for justice, it does not reduce the amount of injustice that it must address, for our society produces new injustices at an ever increasing rate. As the risks of everyday life have declined dramatically, there is a widespread sense that science, technology and government can produce solutions for many of the remaining and newly revealed problems. Thus, the line between what is seen as unavoidable misfortune and what is seen as imposed injustice shifts. As resources increase and expectations rise, new vistas in injustice unfold and new demands for remedies will be brought to the legal system.

V. Bryant Garth, Director, American Bar Foundation

Garth argues for the importance of an examination of the role and position of the legal profession in the market for court reform. It is important to understand the role of the profession, but also the larger political and economic context. The author propose an analysis of sociological factors that explain change. The space for reform will be enlarged by better understanding of what might otherwise be seen as the social determinants of reform. Some reforms are in the ball park; others are understood by the participants to be out of bounds, and those understandings reflect some assessment of the sociology of the reform process.

Comparative studies suggest that we can point to some similarities in the role of the courts in different places and times. But the role is both more flexible than we generally imagine, and more tied to the interests and roles of the legal profession. One of the matters that determines the domain of law or the courts is the place and power of the legal profession. Thus, the only way to understand the different roles and potential roles of courts is to study very carefully how a particular legal system and legal profession relates to government and economy in particular settings. One entry into this inquiry is to examine how relations internal to the legal profession shape the discussion of court reform. Court reform can be the site of competition in the legal profession. The changes that take place can be seen as a product of this competition, which is at the same time internal to the profession and responsive to power outside of the legal field. This competition is first of all a contest about the hierarchies and status of particular groups, and their vision of the courts.

The author raises a series of questions in an attempt to inspire some sociological consideration of the civil justice reform process in Ontario.

(a) Internationalization of Economies and Legal Practices

NAFTA reinforces the notion that we have one market for North America. We might ask whether there is also potentially one market in legal services, and maybe even one market in dispute resolution providers. Legal services and courts traditionally have been essentially national monopolies. Will multinational/transnational competition open up the market to make space for a new set of providers in Canada? Competition for the business of handling business disputes could make it very difficult for Ontario courts to oversee private justice. If parties in international business relations can opt for private arbitration outside of Ontario, there are bound to be market pressures on Ontario to offer the same services—insulated from court review—that are offered elsewhere.

NAFTA will provide one new and different type of dispute resolution, which will handle certain kinds of dispute. More subtle is the impact of NAFTA and the GATT on the regulatory activities of the state, which will affect courts to the extent that regulatory activity has been policed by the courts. If we wish to insist that one of the major roles of the court is to be involved with the enforcement of state regulation of business, e.g. environmental, consumer, and other areas, this role might be undermined by the legal structure of NAFTA, in turn policed by the specific dispute resolution mechanisms of NAFTA, not by the courts. NAFTA is designed to maintain a particular form of neo-liberal state that puts state regulation of the economy somewhat on the defensive.

(b) Mapping the Players in Civil Justice Reform

Various groups within the legal profession may agree that courts should be open, accessible, neutral and legitimate but those groups will have different positions on what these terms mean. Consider the following groups/perspectives:

1. The various perspectives within the judiciary

2 The rise of inhouse counsel

3. New providers and their allies in the academy, the judiciary and practice.

4. The role of the state.

5. Public interest representatives

6. Pure law and legitimacy

7. Other practising lawyers, especially litigators

It may be better to understand the market in court reform than to ignore it. Should or can Ontario adopt protectionist legal policies for courts, lawyers and providers?

VI. Cyril Glasser, Solicitor, London, England

The issue of accessibility sometimes has been limited to notions of subsidized legal representation; sometimes it refers somewhat more broadly to user-friendly institutional arrangements. A discussion about classification has arisen because of the fragmentation of our perception of what constitutes the civil process and the methodology of disputing. Civil decision-making is often not the

result of a dispute; issues arising from the use of discretionary and regulatory powers have become huge subjects in themselves.

Perhaps we should be concentrating on advice facilities which will minimize disputes being carried on into courts and tribunals and put a higher premium on avoiding disputes or settling them. The author notes the prominent role of the state in funding a legal aid system—an issue that is almost entirely skirted in Professor Macdonald's paper, but which the Civil Justice Review may not be able to avoid at least with respect to what kinds of civil disputes legal aid facilities should be available for. Glasser cites some striking numbers on the growth in expenditures on legal aid in Britain, including legal aid for civil proceedings. Perhaps it would be useful if similar figures were generated for Ontario. According to the author, the cost of legal services in Britain appears to have risen twice as fast as prices over the last 20 years. The author emphasizes that we are concerned with political decision-making and the method by which choices are made. We need to be concerned with the management of change and the process of debate and research about the issues involved on an ongoing basis. He expresses a preference for the establishment of ongoing institutional arrangements that oversee strategy for the coordination of the civil process. Such arrangements would be responsible for producing an integrated medium-term financial strategy for the expenditure of public funds in the field that would be open for wide public discussion. He argues that we may be moving toward systems where we distinguish sharply between the maintenance of a central court system concerned with litigation involving public interest elements, and arbitral systems, with minimum state funding and involvement, concerned largely with private disputes. He also expresses a preference for the formal adjudicative process to offer a choice, not just of remedies, but of methods of disputing. The provision of a legal supermarket would encourage choice and help restrain costs and delay. He also expresses a preference for variety in procedures. We need to examine cases on a "type" basis in order to devise appropriate procedures for settlement and resolution. His final preference is for a more careful and interconnected approach to advice and representation services of all kinds and not simply those provided by the legal profession. The role of non-lawyers in the disputing process is often under-valued.

VII. Deborah R. Hensler, Institute for Civil Justice, Rand Corporation

Dr. Hensler finds herself in accord with Professor Macdonald in that in the U.S. civil justice reform efforts frequently proceed prior to problem definition, rarely confront differences in values and perspectives of the participants in the process; find little or no empirical basis to support claims: and often pursue policy fixes that are poorly thought through. She has been pursuing for several years efforts to secure institutional support for the establishment of a legal indicators data system.

The author argues for the establishment of policy reforms on an experimental basis, as a way of establishing a better empirical fix on the likely effects of these changes. She points out that experiments with court administered arbitration systems in the U.S. show that they produce little in the way of aggregate time and cost savings, despite persistent claims to the contrary by their proponents.

Another proposal that she advances is targetted analysis of particular problems. With respect to the costs of litigation, she points out that in the U.S. empirical studies show that the primary costs of civil litigation are private not public and understanding what drives private litigation costs should be part of any civil justice reform effort.

The need for a civil legal indicators programme, the advisability of experimenting with procedural reforms prior to wholesale adoption, and the value of targetted analytic efforts suggest to her the need for the establishment of an ongoing policy research and analysis capability within the Justice system.

Dr. Hensler strongly endorses Professor Macdonald's call for involving the users of the civil justice system in any evaluation of the current system. In her work in the U.S., she has often found that policy-makers' views of what the public wants are almost wholly speculative, while studies of ordinary citizens' aspirations or evaluations of the civil justice system tend often to be at variance with policy-makers' views.

She argues that one area of emphasis in reform efforts should be research on procedural justice, designed to establish what norms of procedural fairness users of the system attach special value to (irrespective of outcomes).

VIII. George L. Priest, Professor of Law, Yale Law School

Professor Priest, while strongly laudatory of Professor Macdonald's report, believes that his recommendations are problematic and conflict with a number of the values he discusses in his text. In particular he challenges the proposition that only those disputes regarded as more important or more central to public ambitions with respect to dispute resolution should be retained within the jurisdiction of the Ontario Court (General Division). The exercise then becomes one of defining the criteria of centrality for excluding cases.

The author challenges the proposition that corporate disputes should be denied access to the Ontario Court (General Division) and must arrange for dispute resolution privately or that commercial disputes generally should be excluded from the court. First of all it is not evident that this allocation of disputes will have any substantial effect on the costs and delays of civil adjudication. It is difficult to believe that the disputes that Macdonald would

deny access to the Ontario Court (General Division) are a source of substantial civil justice delay. More generally, there is no categorical allocation scheme, however complex, that will have a long-term effect to reduce trial delay. The diversion of even a substantial number of disputes through allocation will only lead a different set of disputes to take its place.

There are very few modern examples of private dispute resolution in the context of the total denial of recourse to public adjudication. The consequence of total denial of access to public adjudication may well be severe. First, it is difficult to imagine the grounds upon which private disputes can be resolved. Settlements occur out of court when the parties come to agree on the range of possible outcomes at trial and where they realize that mutually agreeable terms of settlement are preferable to the consequences of pressing the case to judgment. The "shadow of the law" thus defines the outline for the terms of settlement. Arbitration in commercial contexts is not generally different. An ex ante decision to accept an arbitration clause could not be sensibly made unless a party possessed some confidence with respect to the outcome of public adjudication, the outcome of arbitration, and the differences between them. If the grounds for decision in arbitration and public adjudication began to diverge systematically, arbitration would be chosen only if its divergent grounds simultaneously benefitted both parties to the transaction—an unlikely occurrence. Similarly, if outcomes of arbitration began to become highly variant, agreements to arbitrate would decline precipitously.

A second serious concern with the denial of access to public adjudication of some significant set of disputes is the implication of such a policy for the expression of public values through adjudication, as advocated by Professor Fiss. Even in disputes between corporations over issues of commercial law, the public may be affected substantially in innumerable ways from these determinations. More generally it is difficulty to identify any activity of the corporation that does not affect some set of physical persons.

Finally, Macdonald's broader allocation principle that whenever the balance of social power lies heavily against the physical person, the mechanism adopted should be designed in part to rebalance that disparity of power is highly problematic and implies that the adjudicator would no longer be neutral but would be intended to achieve some redistribution of power.

Priest suggests an approach towards study and reform that might affect cost and delay, which would focus on reforms that may serve to facilitate voluntary settlement of civil disputes. At present, our understanding of the process of settlement, or conversely the determinants of litigation is quite unformed. While there is extensive literature describing analytically the determinants of litigation settlement, there has been little application of this learning to real cases. Aggregate judicial statistics are not generally useful for understanding the

litigation process and are useless for understanding the determinants of litigation and settlement. In contrast, the author proposes that the Commission recommend that a new procedure be implemented upon the recording of any judgment as well as any settlement, modelled loosely on the Cook Country Jury Verdict Reporter, which entails counsel for the parties filling in a short questionnaire after a matter has been concluded. This would provide the basis for the study of the determinants of settlement failures that generate costs and delay in their civil justice system.

IX. Peter H. Russell, Professor of Political Science, University of Toronto

Russell focusses principally on the politics of civil justice reform. A necessary, but by no means sufficient condition for significant reform will be the support of the Attorney General for Ontario. It is also necessary to focus on other political preconditions to the viability of reform proposals. The first condition is that any proposals not cost much money and indeed preferably should be able to be advertised as potentially leading to a reduction in public and private spending on dispute resolution. The second condition is that proposals identify the worst injustices that result from the existing system and target these as immediate reform priorities. In today's political climate, this right-left approach: deficit reduction and confining public intervention to the most vulnerable, is the recipe most likely to appeal to the policy chefs of whatever party is in power.

While Russell can see in Macdonald's paper lots of potential for the economizing, privatizing (right-side) of the ledger, he does not see much for the social justice left side. Anecdotally, the author reports that the media often claim that lower middle-class individuals ("one-shotters") in disputes with stronger adversaries often have to "lump it" because they cannot afford the time and money it will take to litigate. Presumably the stronger party, particularly in the situations where its own case is recognized as being weak, has little incentive to consent to a less formal, more expeditious but fair system of dispute resolution. These situations often result in individuals foregoing attempts to test plausible and substantial claims in real estate, wrongful dismissal and like disputes. The Civil Justice Review needs to attend systematically to identifying major social injustices resulting from the existing system and possible ways of addressing these. At the top of the author's personal agenda in this field for a long time has been small claims courts. Macdonald has little to say about the consequence of Ontario using the amount in dispute as the criteria for the adjudication of small claims and shadowy tribunals presided over by moonlighting, part-time judges. He takes issues with Macdonald's claim that we take so much care in appointing judges when this clearly does not apply to the appointment of judges in Ontario Small Claims Courts. For the author, a test of the Civil Justice Review's concern for social justice will be its attention to the processing of small claims.

The author is concerned with whether either the bar or bench, separately or together, use their policy clout in a negative sense to veto policy proposals. The issue around which an alliance of bench and bar is most likely to be formed and to be successful in blocking reform is any serious measure of dejudicialization. Public opinion can be mobilized against reforms if they are attacked by leaders of the bar as endangering the rule of law by taking power away from the judiciary. If this is correct, then it would be wise to soft-pedal dejudicialization and cultivate allies for whatever reform is proposed in the top echelons of the bar and bench.

The author also argues for judicial control over court budgets and court administration but on condition of greater public accountability for court performance. The author thinks that the case for making judges fully responsible for the management of their own institutions is the same as making professors responsible for controlling universities, but this would require a stronger institutional base for the assembling and analysis of information about civil disputing in order to ensure adequate public accountability for court performance.

X. Susan S. Silbey, Professor of Sociology, Wellesley College

In the literature on civil justice, attention to litigants' experiences and perceptions is an often neglected area. Professor Silbey argues that law is constitutive, something simultaneously producing and produced by social interactions where popular conceptions of law are aspects of the life of the law and neither entirely an independent nor entirely a dependent variable. Cultural analyses of law attempt to describe the processes by which law contributes to the articulation of meaning and values in daily life. These meanings and values are neither fixed, stable, unitary, nor consistent. The ideas, interpretations, actions and ways of operating that collectively represent a person's legal conscience may vary across time (to reflect learning and experience) or across interactions (to reflect different objects, relationships or purposes).

Professor Silbey reports on a major empirical study undertaken by her through interviews in New Jersey. This study found no significant variation in the *number* of potentially legal problems that people experienced in terms of race/ethnicity or gender. However, there is variation in the frequency with which different racial groups reported having experienced certain problem situations i.e. the *type* of legal needs or type of problems experienced did vary by race/ethnicity and gender. For example, the legal needs of racial/ethnic minorities concerned discrimination, housing, police harassment and poor police protection. Women are more likely to experience problems related to their traditional gender roles of mothers, wives, and consumers and are more likely to experience job-related problems such as sexual harassment and unequal wages. There was little or no

difference in the likelihood that minority and non-minority citizens would turn to law in responding to what they described as problematic situations. The interviews reveal not one story of law but many. People's understandings of law are neither fixed nor unitary but instead seem to vary across time and across interactions. In some cases, perceptions involve conformity, in others contestation, and others resistance (i.e. three forms of legal consciousness). The density of social relations (how connected a respondent is to others, how many social relationships the respondent names) is a strong predictor of the variations in legal consciousness. The less well connected, the fewer social relationships, the less likely a respondent is to turn to law as a response to a perceived legal problem.

XI. Lynn Smith, Dean and Professor of Law, Faculty of Law, University of British Columbia

The author states that the three threshold questions for the Fundamental Issues Group that emerge from Macdonald's discussion are:

(1) what problems is the Civil Justice Review meant to address: cost, delay, court overcrowding, or outcomes for litigants?

(2) which evaluative perspective should be adopted: internal participants, or users and potential users of the system? and

(3) what data are or could be made available to assist in the assessment of the extent of the problems and the likely effectiveness of proposed solutions?

Professor Smith argues that more attention needs to be focussed on the role of the legal profession and the judiciary and rules and policies that may change the behaviour of lawyers and judges as they affect costs, delay, and access. In addition, she asks whether one should assume that there is no room for improvement by judicial decisionmakers that would increase the public satisfaction with the civil justice system with respect to principles of due process. She also asks whether there are features of the legal culture as well as aspects of the rules of civil procedure that serve to prolong litigation and render it more costly without a compensating benefit e.g. the economics of law practice, cost rules, case management systems, rules of civil procedure etc.

She is inclined to contest Professor Macdonald's argument that the precision or imprecision of legislative rules is a trivial component of the equation relating to rates of litigation, by citing examples from Canadian constitutional law where

after perhaps an initial period of uncertainty, Supreme Court decisions have dramatically reduced the zone of uncertainty and may well have had a substantial impact on decisions *not* to commence litigation.

Professor Smith considers that it would be useful to inquire further as to the extent of the advantages that accrue to repeat players in the civil justice system and to know more about the extent and sources of this advantage. It may be that previously marginalized groups in the civil justice system, by concerting their efforts, can capture some of the advantages of being a repeat player. She gives the example of the litigation strategy adopted by LEAF.

With respect to the classification of interpersonal and social conflicts, she argues that beyond the various taxonomies reviewed by Macdonald, it may be useful to go somewhat deeper and consider the types of conflicts themselves. For example, is there a case for adopting a categorization system that separates out cases raising equality issues?

XII. Michael J. Trebilcock, Professor of Law, Faculty of Law, University of Toronto

A law and economics perspective on most legal issues attaches a central weight to the incentive properties of alternative legal and institutional regimes. This is an important consideration with respect to many issues pertaining to access to civil justice.

Three broad facets of the civil justice system appear to be motivating the Civil Justice Review Project: cost, delay and access. However, there are clearly major tradeoffs across the objectives. Maximizing access may well exacerbate delays. Similarly, minimizing costs may increase access but also delays. Minimizing delays may increase costs, at least for the public treasury, if this entails providing more court resources. More fundamentally, implicit in the premise that a review is required is either that some cases are in the system and consuming resources when they should not be, or that other cases which should be in the system are being discouraged but should not be. However, we have no clear empirical fix on what classes of civil cases consume most of the time and resources of the court system or what cases which are currently being deterred under the existing system would be forthcoming under a different set of arrangements.

In considering issues that bear on the relation between public and private provision of civil justice, we need to think clearly about what aspects of the provision of civil justice constitute a public good. Traditionally, services such as national defence and policing have been thought to be public goods in the sense

that once they are provided, beneficiaries of the services cannot be excluded from consuming them even if they do not pay for them. Similarly, if there are major positive externalities from the provision of civil justice, clearly it will be suboptimally supplied by private providers. Again, if there are very large economies of scale and scope in the provision of civil justice, it might be viewed as a kind of natural monopoly that should be publicly provided. The author's impression is that unlike national defence or police services, many civil justice services can be priced and rationed. On the other hand, there may be major positive externalities from the provision of civil justice such as providing an avenue for addressing grievances in a civilized fashion and providing some measure of consistence and predictability in decisionmaking by generating legal rules which other parties can rely on in shaping their own conduct. The inherent economies of scale and scope in the provision of civil justice do not seem to be such as to require a single monopoly provider. In thinking about the channelling or screening process described by Professor Macdonald, it is important to ask in each case whether there are public goods aspects to the class of dispute in question which require a public institutional presence (and what kind of presence).

The author makes a case against strategic planning and for institutional pluralism by arguing that in resolving the allocation issues between dispute resolution regimes, it may be preferable to use pricing mechanisms rather than command and control forms of regulation. Thus, there may be a case for pricing the services provided by the formal court system at fully allocated social costs, which in many cases is likely to induce settlement rather than litigation and in other cases to induce parties to use alternative forms of dispute resolution. Where there are major public goods features to adjudication such as significant implications for third parties (probably a very small percentage of all civil litigation), there is a case for using targeted rather than untargeted subsidies. For example, impecunious litigants with claims that exhibit these significant externality characteristics might be subsidized through the legal aid system and in other cases the court may waive all or some of the fully allocated social costs of determining a dispute for other litigants. Thus, contrary to much conventional thinking, the case for public provision of civil justice services seems strongest where there are major externalities associated with judicial decisions, i.e. cases with major polycentric features, although it has often been claimed that courts are ill-suited to performing these kinds of adjudicative functions.

The author then proposes a decision-tree framework for contemplating institutional options in the provision of civil justice services. Assuming that the legislature had decided to recognize a particular class of legally cognizable interests as meriting protection, the threshold issue is whether this interest should be protected through public or private law enforcement. In the former case, publicly enforced sanctions or regulatory requirements might be designed to pre-empt the need for civil enforcement of individual claims. Similarly the provision

or underwriting of public legal education might be designed to enable citizens to avoid potential disputes in the first place by appropriately ordering their affairs or educating them on how to prosecute complaints effectively on a self-help basis. The author suggests that for most citizens, small scale complaints of unresponsiveness in large firms or bureaucracies are likely to constitute the great bulk of complaints and for the most part these complaints are not readily amenable to resolution through formal adjudicative process. The author suggests that larger manufacturing and retailing firms dealing with consumers perhaps should be required to provide a 1-800 number and a designated person in charge of customer relations to handle complaints; similarly with large government departments or agencies with extensive direct contacts with citizens. Where this fails to yield a satisfactory resolution of a complaint, there may be a case for the state facilitating or mandating the provision of informal independent arbitration processes. In yet other cases, the state might consider making more widely available largely self-executing remedies, like the cooling-off period provided under consumer protection legislation for door-to-door sales.

For other classes of more substantial disputes, other approaches may be appropriate. For example with respect to workplace injuries and automobile accidents, administrative compensation systems seem to have many virtues in providing civil justice in important respects on a wholesale rather than a retail basis, where individualized determinations of fault or responsibility and quantum of compensation are heavily circumscribed. For residual small claims, there may be a case for reforming small claims courts by appointing practising lawyers to sit on a part-time basis in evening or Saturday sessions on a *pro bono* or nominal fee basis. As well, there may be a case for loosening the monopoly of the legal profession over representational functions, by facilitating participation of paralegals in this function in small claims courts and in other dispute resolution forums other than higher levels of formal judicial adjudication.

With respect to the formal judicial adjudication process, the author suggests there may be some savings in cost realizable by greater specialization in adjudicative functions, which in turn is likely to lead to a more specialized bar. By way of further encouraging settlement, there needs to be some investigation of possible reforms to existing cost rules that penalize rejection of settlement offers that exceed the result at trial. The author also suggests that in a much wider range of matters than is presently the case, there may be a merit in dramatically reduced reliance on oral evidence and a much greater reliance on written evidence. Finally, he suggests that various forms of legal insurance may permit some spreading of risks with respect to litigation and that a carefully crafted contingent fee regime may permit a similar risk shifting function.

XIII. Garry D. Watson, Professor of Law, Osgoode Hall Law School, York University

The author emphasizes that the options open to us are path dependant, conditioned and limited by where we have been. He questions proposals that conceive of the publicly funded dispute resolution system as just another government service which is part of the social safety net to be rationed on a means test. First, this would be to deny the history of the court system. Second, such a proposal would be politically unacceptable and hence unachievable. Third, the task of drafting the jurisdictional boundaries by which cases are included and excluded from the system would be highly problematic. A less drastic approach would be to explore using increased user fees for certain classes of cases or for proceedings where the trial lasts longer than a specified time.

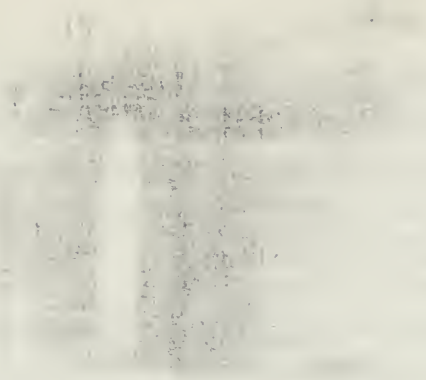
With respect to ADR proposals, there is a serious question as to whether ADR can be integrated in the existing court system in such a way as to avoid a duplication of effort. Most of these concerns are non-issues when resort to ADR is left to market forces and is based upon consensual agreement between the disputants. However, no consensual arbitration of any significance exists in Canada outside the labour relations field. The fact that ADR has been little used to date and hence disputants and their advisors are unfamiliar with it may make it politically difficult, at least in the short term, to mandate ADR as part of the publicly funded dispute resolution system.

The author emphasizes the various complexities in reform of the dispute resolution system. He points out that settlement rates are already so high that it may be very hard to increase them through mechanisms such as pre-trial conferences or court mandated mediation. He also points out that reforms designed to reduce public costs of the civil justice system often entail increasing private costs e.g. requirement that litigants prepare motion records and factums on interlocutory motions or prepare, exchange and file witness statements with the court. The author argues that there is no evidence that early judicial settlement conferences, pre-trial conferences or court mandated mediation increase overall settlement rates or result in earlier settlements, although entailing additional expenditures of public and private resources. Procedural changes designed to bring about speedier adjudication, e.g. a broadened summary judgment procedure or court mandated arbitration, are vulnerable to the same concerns. In all these cases, if reforms are effective in increasing the disposition rate, reducing delay and reducing private litigation costs, cases which would not have entered the system will now enter the system and if they do so in sufficient numbers they may effectively wipe out the efficiency gains initially achieved.

With respect to proposals to reduce private costs through procedural reform, such as significantly reducing the role of discovery, the author expresses the same scepticism in that alternative methods of obtaining the same information

may be as or more expensive. On the other hand, he asks whether we have put undue emphasis on the role of fact finding by courts, and excessively relied on the oral continuous trial that for historical reasons, when civil juries were widely used, may have had a justification which it lacks today. Here there may be some potential for broadening the scope for disposition of proceedings on paper rather than requiring in so many cases the presentation of oral evidence in the event of a trial. In an appendix to his paper, he develops an historical perspective on the continuous oral trial and raises contexts where a trial would not seem necessary, e.g. where there are no facts in dispute, where a claim or defence is legally invalid.

The author concludes that unless we wish to wallow around forever in ignorance as to the actual impact of procedural reforms, we have to take steps to measure their impact, notwithstanding that the business is both time consuming and expensive.



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